

**Title:** Application of Existing Use Concept in Conducting Use Attainability Analyses for Long-Term Control Plan Communities for Primary Contact Recreational Uses

**Identification Number:** Water-014

**Date Originally Effective:** April 11, 2008

**Dates Revised:** None

**Other Policies Repealed or Amended:** None

**Brief Description of Subject Matter:** To provide understanding of the existing recreational uses of CSO-impacted waters.

**Citations Affected:** 40 CFR 131.10(g); 40 CFR 131.3(e)

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## 1. PURPOSE

The purpose of this policy is to assist Combined Sewer Overflow (CSO) communities to generate an accurate and defensible description of the existing recreational uses of CSO-impacted waters. Existing uses are defined at 40 CFR 131.3(e) as ". . . those uses actually attained in the waterbody on or after November 28, 1975, whether or not they are included in the water quality standards". Water quality standards in Indiana establish the designated use of primary contact recreation for all waters of the state. For CSO-impacted waters, it is possible that the designated use of primary contact recreation may not be attainable during wet weather events. Federal regulation at 40 CFR 131.10(g) allows states to remove a designated use provided the designated use is both not an existing use and not attainable based on one or more of the six factors found at 40 CFR 131.10(g). According to federal regulations, an existing use cannot be removed or replaced by a use with less stringent criteria that do not protect the existing use.

Senate Enrolled Act 620 of the Indiana General Assembly's 2005 legislative session directed the IDEM to develop a subcategory of the recreational use category that would be available to CSO communities for a limited number of days following CSO events provided the community has prepared and received IDEM's approval of a Long-Term Control Plan (LTCP) for the elimination or management of CSOs and conducted a use attainability analysis (UAA) consistent with 40 CFR 131.10(g) to demonstrate that removing the primary contact recreational designated use is not removing an existing use.

## 2. SCOPE

This policy affects CSO communities and the review done by the IDEM, Office of Water Quality (OWQ) of the communities' LTCPs and UAAs.

## 3. SUMMARY

CSO communities have largely been consistently in violation of National Pollutant Discharge Elimination System (NPDES) permit limits during and for some time following a CSO discharge event. While developing its LTCP, a CSO community, while considering all reasonable alternatives for the elimination or management of CSOs, may realize that, even with full implementation of the LTCP, some limited number of CSO events may still occur. To address these events, the CSO community may develop a UAA for the wet weather limited use subcategory. The establishment of the wet weather limited use subcategory of the designated recreational use category will alleviate compliance issues for CSO communities that may, after full implementation of their LTCPs, have some limited number of CSO events. This NPD describes the application of the existing use concept in conducting a UAA for CSO communities developing LTCPs.

## 4. DEFINITIONS

The following definitions apply to the defined term as used in this NPD:

"CSO" means combined sewer overflow and is the discharge from a combined sewer system from a point prior to the WWTP. CSOs consist of the combination of sanitary sewage and storm water.

"CSO Community" means a community (municipality) that has combined sewer overflow discharges authorized in the community's NPDES permit.

"Designated uses", as defined by Section 131 of the Clean Water Act, are those uses specified in water quality standards for each waterbody or segment whether or not they are being attained.

"Existing uses", as defined by Section 131 of the Clean Water Act, are those uses actually attained in the waterbody on or after November 28, 1975, whether or not they are included in the water quality standards.

"LTCP" means long-term control plan, a document required to be prepared by CSO Communities for the elimination or management of combined sewer overflow discharges.

"NPDES" means National Pollutant Discharge Elimination System and is a national program for the issuance of permits to entities that have direct discharge of treated wastewater into receiving waters.

"UAA" means Use Attainability Analysis and is a structured scientific assessment of the factors, which may include physical, chemical, biological, and economic factors, affecting the attainment of the use and is required to be conducted by a community in order to justify a possible change in the CSO-impacted waterbody's designated use.

"Waterbody" means a body of water defined by a community in its LTCP and is the geographic extent of a portion of a river or stream that is expected to be impacted by a CSO discharge following full implementation of the LTCP. The UAA and any resulting revisions to the state water quality standards must also include a clear description of the geographic extent of the applicability of the wet weather limited use subcategory.

## 5. ROLES

LTCPs submitted by CSO Communities are reviewed for approval by the OWQ's Wet Weather Section. Any change in the designated use of a water of the state is considered to be a change to Indiana's water quality standards that must be adopted through rulemaking by the Water Pollution Control Board into the water quality standards of Indiana and is subject to review and approval by the U.S. Environmental Protection Agency consistent with Section 303(c)(3) of the Clean Water Act and federal regulations at 40 CFR 131.5, 40 CFR 131.6, and 40 CFR 131.20.

## 6. POLICY

### 6.A.

#### APPLICATION OF "EXISTING USE" CONCEPTS

Combined Sewer Overflow (CSO) communities may seek a revision of a designated use and associated water quality criteria applicable to a CSO-impacted waterbody<sup>1</sup> in conjunction with preparation of a Long-Term Control Plan (LTCP). An example of such a potential revision is the CSO wet weather limited recreational use subcategory established by Senate Enrolled Act (SEA) 620 of the General Assembly's 2005 legislative session ([IC 13-18-3-2.5\(a\)](#)), which, if approved, replaces full body contact recreational use for a period during and not more than four days after certain wet weather events. To obtain a change to the current designated recreational use for a community's CSO-impacted waterbodies and qualify for the new CSO wet weather subcategory, the community must (1) demonstrate that the proposed change would not result in removal of an existing use and (2) complete a use attainability analysis (UAA) that shows why the designated recreational use is not attainable during the defined wet weather event and what the highest attainable recreational use is during this time. Also, any use change is considered a change to Indiana's water quality standards and must be approved by the Indiana Water Pollution Control Board and is subject to review and approval by U.S. EPA, consistent with Section 303(c) of the Clean Water Act and federal regulations at 40 CFR 131.5, 40 CFR 131.6, and 40 CFR 131.20.

Whether the current designated use for a waterbody is also an existing use poses a critical issue under EPA regulations. If the designated use is an "existing use", it cannot be removed<sup>2</sup>. An "existing use" is defined as a use actually attained in the waterbody on or after November 28, 1975<sup>3</sup>. However, the term "actually attained" is not defined in federal or state regulations or law. In addition, federal regulations at 40 CFR 131.10(d) state that a use is deemed attainable and cannot be removed if it can be achieved by imposition of effluent limits required under Sections 301(b) and 306 of the Act and cost-effective and reasonable best management practices for nonpoint source control.

In assessing a request to change a recreational designated use for a waterbody, IDEM will first need to determine whether changing the designated use would result in removal of an existing use, since a change involving removal of an existing use cannot be approved. On the other hand, if an existing use would not be removed, then IDEM can consider a UAA to change the designated use.

IDEM will follow the process described below to determine whether a change in a designated use proposed in conjunction with a LTCP would remove an "existing use", thereby preventing the proposed change. The process has two main steps:

1. Identify existing recreational uses of CSO-impacted waterbodies.
2. Determine whether the proposed change to a CSO wet weather limited recreational designated use would result in removal of an existing use.

#### 6.A.1.

##### Step 1. Identify existing recreational uses of CSO-impacted waterbodies

The determination of the existing use of a waterbody is based upon a review of the conditions that have occurred from November 28, 1975, to the present. Since the main focus of this guidance is existing recreational use corresponding to wet weather conditions and related CSO impacts, communities should describe the kind or kinds and extent of recreation that have typically occurred during periods of CSO impact to the waterbody and the water quality associated with the recreation during such periods. Information that may be relevant to evaluating the existing use in relation to wet weather conditions includes the following:

- The age of the CSO system (does it predate November 28, 1975).
- The factors that trigger an overflow event.
- The number of overflow events that occur in a typical year.
- The water quality following an overflow event.
- The identification of any local community programs that prohibit or discourage use during wet weather events (with the understanding that the existence of programs that prohibit or discourage use does not lead to a presumption that there has been no actual use of the waterbody during wet weather events).
- The types of recreation occurring on the impacted waterbodies and the basis for the determination. Useful tools for collecting this type of information include:
  - Surveys of local recreational organizations, neighborhood associations, and other groups and individual residents close to or likely to recreate in streams.
  - Interviews with members of local recreational organizations, neighborhood associations, and other groups and individual residents close to or likely to recreate in streams<sup>4</sup>.

Such information can be drawn from the LTCP and other sources, as appropriate.

As a general matter, in assessing recreational uses attained in a waterbody since November 28, 1975, IDEM may find that a waterbody has several distinct "existing uses", relating to different weather conditions or seasons. For example, IDEM might conclude the following for a specific waterbody that during:

**Cold weather:** No recreational use has occurred.

**Dry, warm weather:** Demonstrated recreational use has occurred, and people were exposed in varying degrees (depending on the specific recreational activities) to low bacteria levels in the water.

**Wet weather events (and for a short period afterward):** Very limited or no recreational use has occurred due to high flows or poor water quality, or both, including very high bacteria levels.

Under this guidance, CSO communities may pursue one of two options for determining the existing use of a CSO-impacted waterbody under wet weather conditions:

##### 6.A.1.a.

Option a. **Determine that primary contact recreation does not occur under wet weather conditions.** A community may ask IDEM to make a determination of "no existing recreational use" during specific wet weather events associated with CSO-impacts to the waterbody. The community must define the geographic extent of the "no existing recreational use" determination being requested. To support such a determination, the community would need to demonstrate that recreation does not or has not occurred in the CSO-impacted water during the periods of impact from the specific wet weather events for reasons in addition to poor water quality. An example of such a reason could be high flow conditions that preclude safe stream entry based on factors including, but not limited to, the following:

- Flow velocity.
- Stream bottom substrate.
- Stream and bank slope.
- Stream and bank vegetation.

Communities would need to submit information, as outlined in the Step 1 bulleted list (found in 6.A.1.), describing dry weather and wet weather conditions related to recreational stream use, flow, and water quality. Based on the information submitted, IDEM may make a determination of no existing recreational use during the specified wet

weather events, allowing the community to proceed with a Use Attainability Analysis to determine the attainable use of the waterbody during those specific events. For more information on this approach, see "Information to Support a No Existing Use Determination During Selected Storm Events for CSO-Impacted Portions of Marion County Streams"<sup>5</sup>.

#### 6.A.1.b.

Option b. **Determine the recreational uses that have occurred and the water quality that has prevailed during periods of CSO impact.** Under this alternative approach, if some recreational activities have occurred since November 28, 1975, in a CSO-impacted waterbody during wet weather, then the pertinent existing use of that waterbody will consist of the recreational activities and the associated water quality that are characteristic of such wet weather conditions. In situations where CSO impacts affect the bacteriological quality of the waterbody such that the criteria supporting the designated recreational use have not been attained, then the existing use of that waterbody will consist of such representative recreational activities occurring under impacted water quality conditions. Such conditions fall short of attainment of the designated recreational use of full body contact, and, under such circumstances, a CSO community could proceed to the second step, which is an evaluation of whether the proposed change in designated recreational use would result in removal of the identified existing use.

#### 6.A.2.

##### **Step 2. Determine whether the proposed change to a CSO wet weather limited recreational designated use would result in removal of an existing use**

If the determination reached through the approach in Step 1, Option b, above, is that the existing recreational use of a waterbody during wet weather-related CSO impacts falls short of attainment of the designated use, IDEM will consider whether the proposed change in designated use would result in removal of an existing use<sup>6</sup>. Simply speaking, this involves a comparison of the parameters of the existing use with the projected water quality of the waterbody under the CSO wet weather limited use classification.

It is important to recognize in this context, that a proposed change in designated use to the CSO wet weather limited use subcategory should be accompanied, as a result of LTCP implementation, by a reduction in all or some of the following:

- Current physical extent of adverse impacts of CSO discharges.
- Time over which such adverse impacts would occur.
- Number of wet weather events resulting in CSO discharges.

Thus, if the existing use of the CSO-impacted waterbody is determined to be recreational activities occurring under impacted water quality conditions, as described in Step 1, Option b (6.A.1.b. above), the reclassification of the waterbody under the CSO wet weather limited use subcategory would not be expected to remove the existing use, since the use revision will be accompanied by water quality improvements compared to current conditions.

#### 6.B.

##### **APPEAL OF IDEM DECISIONS**

If it is determined under the foregoing process of:

Step 1, Option a (6.A.1.a. above); or

Step 1, Option b and Step 2 (6.A.1.b. and 6.A.2. above)

that existing uses of a waterbody will not be removed under a proposed change in designated use to the CSO wet weather limited use subcategory, the community may submit a UAA (if it has not already done so). IDEM will consider whether UAA and other applicable state and federal requirements have been satisfied to support a water quality standards revision. Public comments are accepted during the UAA process. All agency determinations made during this process, including the existing use determination, may be appealed in accordance with [IC 4-21.5](#), the Administrative Orders and Procedures Act.

#### 7. REFERENCES

CWA, Section 303(d)  
Nine Minimum Controls

#### 8. SIGNATURES

\_\_\_\_\_  
Thomas W. Easterly, Commissioner,

\_\_\_\_\_  
Date

Indiana Department of Environmental Management

\_\_\_\_\_  
Bruno Pigott, Assistant Commissioner,  
Office of Water Quality

\_\_\_\_\_  
Date

\_\_\_\_\_  
Robert Keene, Assistant Commissioner,  
Office of Legal Counsel

\_\_\_\_\_  
Date

This policy is consistent with Agency requirements.

\_\_\_\_\_  
Indiana Department of Environmental Management  
Quality Assurance Program  
Planning and Assessment

\_\_\_\_\_  
Date

<sup>1</sup>The community defines the geographic extent of the CSO-impacted waterbody in its LTCP.

<sup>2</sup>40 CFR 131.10(g).

<sup>3</sup>40 CFR 131.3(e).

<sup>4</sup>Isolated incidences of atypical recreational activities shall not preclude a determination, under this NPD guidance, that there is no existing use.

<sup>5</sup>This document is available online at:

[www.indycleanstreams.org](http://www.indycleanstreams.org)

under the "Documents" menu. Direct link is:

<http://www.indygov.org/eGov/City/DPW/Environment/CleanStream/Documents/studies.htm>

<sup>6</sup>This second step will not be germane to communities following the first approach to identifying existing recreational uses since a finding of no existing recreational use makes the second step moot.

*Posted: 04/30/2008 by Legislative Services Agency*

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